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IN THE

Supreme Court of the United States

October Term, 2005

PETER PAUL MITRANO,

Petitioner,

v.

ELAINE R. WARSHELL, *et al.*,

Respondents.

Peter Paul Mitrano, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Opinion Below

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") from which petitioner seeks certiorari appears in the Appendix hereto at page A-1. The subsequent Order issued by the Fourth Circuit denying petitioner's petition for rehearing and suggestion for rehearing en banc appears A-25. The amount of sanctions awarded by the Fourth Circuit appears at A-29. The Memorandum Order of the United States District Court for the Eastern District of Virginia, Alexandria Division ("trial court") appears at pages A-9. The amount of sanctions awarded by the trial court appears at A-27. All lower court decisions are officially unreported. The Fourth Circuit's opinion appears at 150 Fed.App. 277 (2005); petitioner's brief appears at 2004 WL 3489024; and, petitioner's reply brief appears at 2004 WL 3489022.

Jurisdiction

The decision of the Fourth Circuit was entered on October 20, 2005. (A-1) A timely petition for rehearing and suggestion for rehearing en banc was filed on November 3, 2005; an Order denying the petition for rehearing and suggestion for rehearing en banc was entered by the Fourth Circuit on November 21, 2005. (A-25) This petition for writ of certiorari was filed within ninety days of said date of November 21, 2005. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

Constitutional Provisions and Statutes

The Fifth, Sixth and Fourteenth Amendments and Title 28 U.S.C., § 1738A.

Statement of the Case

This case arises from an action filed by petitioner, Peter Paul Mitrano, *pro se* (hereinafter sometimes referred to as "Mitrano" and/or "father"), pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and 28 U.S.C. § 1343, seeking only money damages for the deprivation of the father's rights to raise his children. The trial court dismissed the action based upon a stated lack of subject-matter jurisdiction in addition to a stated lack of personal jurisdiction in response to the respective motions to dismiss filed by the respondents.

This action is only for money damages for the outrageous actions and inactions of the

respondents in interfering with the father's right to raise his children. The father has been denied the right to see his son Christopher since January 5, 2001 when the respondents Virginia L. Kelly (hereinafter sometimes referred to as "Kelly" and/or "mother") and William D. Philips ("Philips") took the child from Fairfax, Virginia for an alleged visitation on Friday, January 5, 2001 and failed to return the child on the following Monday, January 8, 2001.

As difficult as this matter has been since January 5, 2001 when the father last saw his son Christopher (note litigation commenced in 2000 and further note that a daughter reached the age of majority on October 4, 2003 and that an older son reached the age of majority on December 27, 2004), the father continues to pursue this matter in part in the hopes of sending a message on behalf of other parents.

The Fourth Circuit affirmed the trial court's decision and assessed sanctions against the petitioner in part because of other litigation not before the Fourth Circuit. (A-1) In addition, the Fourth Circuit limited the constitutional rights of petitioner to file any subsequent civil appeals before the Fourth Circuit. (A-8) Interestingly, while on appeal, petitioner's address was changed in the trial court's records and petitioner did not timely receive the judgment of sanctions from the trial court which the Fourth Circuit relied upon in its award of sanctions against petitioner while at the same time not allowing petitioner his right to appeal the trial court's award of sanctions even though the trial court had reopened the time for petitioner to file his appeal of said sanctions.

Reasons for Granting the Petition

This Supreme Court should rule that an unmarried father has a "constitutionally protected right" to the "'companionship, care, custody, and management' of 'the children he has sired and raised'". See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 652 (1975); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972); *Troxel* v. *Granville*, 530 U.S. 57, 65-66 (2000). Also see *Ram* v. *Rubin*, 118 F.3d 1306, 1310 (9th Cir. 1997). It is clear that an unmarried father has constitutional rights related to his children. The lower courts clearly abused their power in dismissing this action under the guise that a claim for monetary damages was within the domestic relations exception especially when a federal question was presented. Diversity jurisdiction also existed. See *Ankenbrandt* v. *Richards*, 504 U.S. 689 (1992). Note that long ago, Chief Justice Marshall stated in *Cohen* v. *Virginia*, 19 U.S. 264, 404 (1821) that:

> "'. . .We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution . . . .'"

Failing to acknowledge that this Supreme Court stated in *Ruhrgas A G* v. *Marathon Oil Co.*, 526 U.S. 574, 578 (1999), that "[c]ustomarily, a federal court first resolves doubts about its jurisdiction over the subject matter", the lower courts attempted to further seal the dismissal of this action on the basis of lack of personal jurisdiction over the respondents.

The *Rooker-Feldman* Doctrine

As this Supreme Court is well aware, this Court clarified the *Rooker-Feldman* doctrine in *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 125 S.Ct. 1517, 1527 (2005):

> ". . . The Full Faith and Credit Act, 28 U.S.C. § 1738, originally enacted in 1790, ch. 11, 1 Stat. 122, requires the federal court to 'give the same preclusive effect to a state-court judgment as another court of that State would give.' (Citations omitted.) Preclusion, of course, is not a jurisdictional matter. See Fed. Rule Civ. Proc. 8(c) (listing res judicata as an affirmative defense)
>
> . . .
>
> "Nor does § 1257 stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . ., then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion."' (Citations omitted.)

Thus, pursuant to the above-quoted language, it is clear that the lower courts should not have ruled that the instant action should have been

dismissed. With all due respect to the lower courts, Mitrano states the above-quoted language means that the lower courts cannot in essence throw the instant action out of court on the basis of lack of subject-matter jurisdiction. The *Rooker-Feldman* doctrine is clearly not to be used as a vehicle for denying justice. Furthermore, under the principles of the doctrines of claim preclusion and issue preclusion, Mitrano is not precluded from filing the instant action against the respondents for interfering with Mitrano's rights. Also see *Verizon Md. Inc.* v. *Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3 (2002) ("The *Rooker-Feldman* doctrine merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments.") and The Restatement of the Law (Second) § 95, comment g (1971) (amended 1988).

Arguendo, even if the logic of *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 125 S.Ct. 1517 (2005) did not apply to this action, because the underlying custody order from the State of New Hampshire is void, the *Rooker-Feldman* doctrine would not preclude the petitioner from proceeding with his present civil rights actions. See *Elliott* v. *Peirsol's Lessee*, 26 U.S. 328, 340 (1828) ("But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void"); and, *Thompson* v. *Tolmie*, 27 U.S. 157, 169 (1829). Also see *In re James*, 940 F.2d 46, 52 (3rd Cir. 1991). Also see *In re Gruntz*, 202 F.3d 1074, 1083 n.9 (9th Cir. 2000) wherein the court stated that the "*Rooker-Feldman* doctrine does

not preclude a collateral attack of state court proceedings or judgments in the context of an appeal involving an exclusive federal question'" and that the court further stated *In re Gruntz*, 202 F.3d at 1087:

> ". . . Accordingly, the *Rooker-Feldman* doctrine does not render a state court judgment modifying the automatic stay binding on a bankruptcy court. Thus, if it proceeds without obtaining bankruptcy court permission, a state court risks having its final judgment declared void . . . ."

While the above arises from a case involving bankruptcy law, the legal principles are applicable to the instant case. The federal law (28 U.S.C. § 1738A) pre-empts the state law in analyzing the instant action. This means that even if the district court (Lebanon, New Hampshire) in the State of New Hampshire makes a ruling that violates 28 U.S.C. § 1738A, it does not matter if the courts in the State of Vermont and/or the Commonwealth of Virginia agree with said district court in the State of New Hampshire, the federal law stated in 28 U.S.C. § 1738A supercedes any conflicting state court decisions. Because said district court in the State of New Hampshire is only a court of limited and inferior jurisdiction, its decisions and/or rulings made when 28 U.S.C. § 1738A clearly states that said district court in the State of New Hampshire does not have jurisdiction are void. As a result of said district court in the State of New Hampshire issuing decisions and/or rulings that are void, it

does not matter whether the courts in the State of Vermont and/or Commonwealth of Virginia state that the same are not void. A void judgment cannot be resurrected by the courts in the State of Vermont and/or Commonwealth of Virginia; a void judgment stays void. One state cannot through the "Bootstrap Principle" bootstrap another state's void judgment into a valid judgment. See 53 Va. Law Rev. 1241, 1247 (1967), *The Bootstrap Principle*, wherein it is stated:

> ". . . A court does not have power to determine its own jurisdiction merely because the Supreme Court wishes it to be so; it has that power only if the legislature or constitution 'wishes' it to be so . . .
>
> ". . . The legislature might not intend a court of inferior jurisdiction to have the power to determine its own jurisdiction . . . ."

Thus, any attempt by other states to in essence "double bootstrap" the void judgment of the state court of New Hampshire into any form of legitimacy should not be allowed by this Supreme Court. Also see Restatement, Second, Judgments (1982) § 11, comment b, and § 12, comment e.

In *Thompson* v. *Whitman*, 85 U.S. 457, 469 (1873), this Supreme Court stated in a case filed in federal court in the State of New York challenging the subject-matter jurisdiction of justices of the peace in a State of New Jersey state court action that:

> "On the whole, we think it clear that the jurisdiction of the court by

> which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

Thus, a reading of *Thompson* v. *Whitman*, clearly supports the father's position that a void judgment from the state courts of the State of New Hampshire may be attacked. Again, an important fact is that the state court in the State of New Hampshire in the instant case was a court of limited and inferior authority. See *State* v. *Flynn*, 110 N.H. 451, 453, 272 A.2d 591, 593 (1970) and *Kiluk* v. *Potter*, 133 N.H. 67, 68-70, 572 A.2d 1157, 1158 (1990).

In *Galpin* v. *Page*, 85 U.S. 350, 365-366 (1873) which was decided in the same year as *Thompson* v. *Whitman*, this Supreme Court further explained that there is a different standard applied when a court of general jurisdiction makes a determination with respect to its jurisdiction as opposed to a court of limited and inferior authority such the subject state court in the State of New Hampshire and stated:

> ". . . The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the

> record, or their judgments will be deemed void on their face."

Also see *Kalb* v. *Feuerstein*, 308 U.S. 433, 439 (1940) ("The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." (Footnote omitted.)). In the footnote numbered 12 from the case *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940), the Supreme Court explained that the issue of whether a state court decision is void ab initio arises from cases unrelated to bankruptcy. Also see *Moore* v. *Dempsey*, 261 U.S. 86 (1923); *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938) ("If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed."); and, *Frank* v. *Mangum*, 237 U.S. 309, 327 (1915) wherein the Supreme Court stated:

> ". . .[A]bsolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning, or because it was lost in the course of the proceedings . . . ."

Also see *Durfee* v. *Duke*, 375 U.S. 106, 110, 114 (1963), for a discussion of the "rule of finality of jurisdictional determinations" with respect to courts of general jurisdiction (as opposed to courts of special and limited jurisdiction); and, *State* v. *Bushoug*, 109 N.E.2d 692, 694, 695 (Ohio 1951).

Note that in *Sherrer* v. *Sherrer*, 334 U.S. 343, 357-358 (1948), Justice Frankfurter of this Supreme Court stated in an dissenting opinion that:

> "It would certainly have been easier if from the beginning the Full Faith and Credit Clause had been construed to mean that the assumption of jurisdiction by the courts of a State would be conclusive, so that every other State would have to respect it. But such certainly has not been the law since 1873. *Thompson v. Whitman*, 18 Wall. 457, 21 L.Ed. 897 . . . ."

Also see *Grignon's Lessee* v. *Astor*, 43 U.S. 319, 341 (1844) ("That applies to 'courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction"); and, *McCormick* v. *Sullivant*, 23 U.S. 192, 199-200 (1825), ("inferior Courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded").

Thus, this Supreme Court has ruled that "courts of a special and limited jurisdiction" "must show their jurisdiction" or "their judgments, taken alone, are entirely disregarded". In other words, if a court (such as the subject New Hampshire state court) is of special and limited jurisdiction, its judgment is a nullity if the said court does not have jurisdiction. Also see *Coleman Bros. Corp.* v. *City of Franklin*, 58 F.Supp. 551, 554 (N.H. 1945) wherein the court stated:

> "The want of jurisdiction in any tribunal renders its proceedings void and when the want of jurisdiction is

> shown by the record and proceedings themselves, it may be taken advantage of at any time."

Also see *Patterson* v. *Patterson*, 306 F.3d 1156, 1159 (1st Cir. 2002) ("In New Hampshire, '[t]he probate court is not a court of general jurisdiction'"); and, *State* v. *Moquin*, 105 N.H. 9, 13, 191 A.2d 541, 544-545 (1963) where the dissent noted in part that:

> "Unlike the district courts of Massachusetts which are courts of 'general and superior jurisdiction' (citation omitted) . . . the municipal courts of New Hampshire have limited jurisdiction . . . ."

Thus, the *Rooker-Feldman* doctrine also does not apply because of a void judgment by the state court in the State of New Hampshire. In order to understand the basis of this exception, it is most important to understand that any decisions from the state courts in the State of New Hampshire related to the subject children are void as a matter of law. As this Supreme Court is well aware, lack of jurisdiction over the subject-matter cannot be waived. Lack of jurisdiction over the subject-matter cannot even be stipulated to by willing adverse parties to an action. Accordingly, the father contends friendly states such as the State of Vermont and/or the Commonwealth of Virginia cannot dictate and/or rule and/or suggest that the subject court in the State of New Hampshire had subject-matter jurisdiction when, in fact, said New Hampshire court did not have subject-matter jurisdiction.

In order to properly analyze the issue of said void judgment, it is necessary venture into the maze of facts. By way of background, on or before October 1, 2000, Kelly moved into the State of Vermont. In accordance with an existing Virginia custody order, beginning since at least October 6, 2000, the subject children had lived with Kelly in Vermont from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000. Accordingly, when Kelly and Warshell filed a petition to modify a custody order in New Hampshire on October 16, 2000 (and prior thereto), the children were living in both Vermont and New Hampshire.

Said custody Order of the Circuit Court of Fairfax County, Virginia states in part that the parties "shall have joint physical and legal custody of their minor children". Thus, while the mother was exercising her joint physical and legal custody of their minor children and living in Vermont, said minor children were living in Vermont. Because Kelly was living with the subject children in Vermont in October 2000 prior to the filing by the mother of her Ex Parte Petition to Bring Cause Forward and Modify on October 16, 2000, the State of New Hampshire was not a "home State" as defined by 28 U.S.C. 1738A(b)(4) on October 16, 2000. Accordingly, it is clear that the State of New Hampshire was not a "home State" of the children "on the date of the commencement of the proceeding". Also see 28 U.S.C. § 1738A(c)(2)(A)(i).

The father left the State of New Hampshire by the end of day of December 20, 2000. There was no contestant (a "contestant" is defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child") living in the State of New Hampshire at the end of day of December 20, 2000. The father's daughter, Christina, had been unlawfully living with her mother in the State of Vermont. The sons, Peter and Christopher, were living in the Commonwealth of Virginia with their father until Kelly with the assistance of Philips unlawfully took said boys from the Commonwealth of Virginia to the State of Vermont under Kelly's right of visitation and failed to return said boys according to the custody Order of the Circuit Court of Fairfax County, Virginia. Accordingly, after December 20, 2000, the State of New Hampshire no longer could even be considered a "home State" to pursuant 28 U.S.C. § 1738A(c)(2)(A)(ii) because no one was left in the State of New Hampshire.

Thus, any orders issued by the State of New Hampshire after December 20, 2000 are clearly void for lack of subject-matter jurisdiction. Title 28 U.S.C. § 1738A(c)(2)(A)(ii) requires that "a contestant continues to live in such State".

By and through violations of 28 U.S.C. § 1738A by the various States and the erroneous interpretations of 28 U.S.C. § 1738A by the various state courts, Kelly has denied the father his right to even see his youngest son since January 5, 2001 up to at least the date of the filing of the instant petition for writ of certiorari. In summary, Kelly, Warshell, Martin, Pletcher and

Cyr first violated 28 U.S.C. § 1738A(e) by obtaining an ex parte order on October 16, 2000 that in effect took away the father's daughter. Thereafter, on January 3, 2001, the defendants Kelly, Warshell and Martin again violated 28 U.S.C. § 1738A(e) by obtaining another an ex parte order that in effect took away Mitrano's two sons. This ex parte order was also issued in the State of New Hampshire after the State of New Hampshire no longer had subject-matter jurisdiction.

There is no dispute by and through the custody order of the Circuit Court of Fairfax County, Virginia, that the Commonwealth of Virginia "made a child custody or visitation determination" consistent "with the provisions of" 28 U.S.C. § 1738A. Section 20-108 of the Code of Virginia provides that the Commonwealth of Virginia shall continue to have jurisdiction over the custody order of the Circuit Court of Fairfax County, Virginia. The father currently is a resident of the Commonwealth of Virginia. The children's paternal grandparents, who are contestants, have been residents of the Commonwealth of Virginia since 1972. The Commonwealth of Virginia has continuing jurisdiction pursuant to 28 U.S.C. §§ 1738A(c)(2)(E) and 1738A(d).

The father therefore contends that the Commonwealth of Virginia had and has continuing jurisdiction based upon the father's residence in the Commonwealth of Virginia and/or the paternal grandparents' residence in the Commonwealth of Virginia. See the discussions about the Uniform Child-Custody

Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 342 (1998), wherein it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act "that a remaining grandparent . . . should not suffice to confer exclusive, continuing jurisdiction". Contrary to said UCCJEA, 28 U.S.C. § 1738A clearly provides that a remaining grandparent does in fact suffice to confer exclusive, continuing jurisdiction.

Another case discussing this issue is *Clarke* v. *Clarke*, 126 N.H. 753, 755, 758, 496 A.2d 361, 363, 365 (1985), wherein the court stated:

> "Critical to our analysis of the issue of jurisdiction presented here is the recognition that this case involves modification of an existing custody order and not formulation of an initial decree. (Citations omitted.)
>
> . . .
>
> "Unless there has been a final order by an out-of-state court declining jurisdiction to modify its custody decree, the courts of New Hampshire will not assume jurisdiction to modify such a decree."

In addition to the court in the State of New Hampshire not following the above-quoted language from its own Supreme Court of New Hampshire, said court also ignored the language in *Howard* v. *Howard*, 124 N.H. 267, 273-274, 469 A.2d 1318, 1322 (1983) that temporary changes after a permanent change are not to granted absent exceptional cases.

Thus, it is clear that New Hampshire was not a "home State" on the dates that Kelly filed the petitions to modify the custody order from the Commonwealth of Virginia because the children had been living in Vermont part of the time with Kelly prior to the filing of the petitions. See *Neger* v. *Neger*, 93 N.J. 15, 32-33, 459 A.2d 628, 637-638 (1983); *Johnson* v. *Johnson*, 26 Va. App. 135, 149, 493 S.E.2d 668, 675 (1997); and, *St. Andrie* v. *St. Andrie*, 473 So.2d 140, 144 (La. 1985) ("the child was in fact shuttled back and forth between Georgia and Louisiana . . . Therefore, it is clear that the child has no 'home state'."). Also see 45 Hastings L.J. 1329, 1344 (July 1994) ("A child in a joint custody situation might have two established homes.") and *Matter of Adoption of Child by T.W.C.*, 636 A.2d 1083, 1088 (N.J. 1994) ("The jurisdictional requirements of the PKPA, of course, preempt those of the UCCJA").

Because the State of New Hampshire was not a "home State" on the dates the petitions were filed by the mother, the interpretation of the following language contained in 28 U.S.C. § 1738A(c)(2)(A) is critical:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;"

Note that in interpreting the language "and a contestant continues to live in such State", this Court must also consider the statute as a whole. Note that the language is different than the words "on the date of the commencement of the proceeding" that are in the beginning of above-quoted language of 28 U.S.C. § 1738A(c)(2)(A). Also note the difference in words contained in 28 U.S.C. § 1738A(d) that "such State remains the residence of the child or of any contestant". Thus in interpreting the language "and a contestant continues to live in such State", this Court should find that the plain language of said words means that the State of New Hampshire no longer had jurisdiction when all the contestants stopped living in the State of New Hampshire. In the *Matter of Guardianship of Walling*, 727 P.2d 586, 590 (Okl. 1986), the court discussed the language stated above and stated:

> "Paragraph 1.a also does not apply because the children were not in the state at the time the commencement of the proceeding. Furthermore, paragraph 1.b is not applicable because of the requirement of having a 'person acting as parent' continued to live in the state . . ."

Note that in discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 343 (1998), it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act that:

> "If State A had jurisdiction under this Section [UCCJEA] at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding . . . ."

In comparison, the language of 28 U.S.C. § 1738A provides that jurisdiction is divested by all parties moving out of the state prior to the conclusion of the proceedings under 28 U.S.C. § 1738A(c)(2)(A)(ii). Also note *Kalb* v. *Feuerstein*, 308 U.S. 433, 438-439 (1940) wherein this Supreme Court discussed the concept of a state court being divested of jurisdiction.

Accordingly, any orders issued by the State of New Hampshire after December 20, 2000 would be void for lack of subject-matter jurisdiction pursuant to 28 U.S.C. § 1738A. *Also see Badwell* v. *Brooks*, 141 N.H. 508, 512, 686 A.2d 1179, 1182 (1996) ("court's jurisdiction to award custody is purely statutory").

The interpretation of 28 U.S.C. § 1738A is a question of law. Note that in *Thompson* v. *Thompson*, 484 U.S. 174 (1988) this Supreme Court ruled that 28 U.S.C. § 1738A is only a full faith and credit statute and does not create a federal right of action. The State of New Hampshire clearly did not have subject-matter jurisdiction to modify the custody order from the Commonwealth of Virginia. See *Eichelberger* v. *Eichelberger*, 2 Va.App. 409, 412, 345 S.E.2d 10, 12 (1986); *Johnson* v. *Johnson*, 26 Va. App. 135, 146, 149, 493 S.E.2d 668, 673, 674 (1997); and, *Mebert* v. *Mebert*, 444 N.Y.S.2d 834, 837 (1981).

Arguendo, even if New Hampshire had jurisdiction under 28 U.S.C. § 1738A (which the father steadfastly denies), the ex parte New Hampshire order dated January 3, 2001 that dealt with the father's sons would be void because no notice whatsoever was given as required under 28 U.S.C. § 1738A. See 28 U.S.C. § 1738A(e). See *Ex Parte Raywood*, 549 So.2d 103, 104 (Ala. 1989) wherein the court stated: "we find that the Louisiana ex parte order was not made consistently with the PKPA and is not entitled to full faith and credit by the courts of Alabama"; also *see Joel M.* v. *Karen M.*, 507 N.Y.S.2d 369, 371 (1986) wherein the court stated:

> "The sole issue presented in this enforcement proceeding is whether or not the Superior Court of the State of New Hampshire in making the ex parte temporary order of custody was exercising jurisdiction substantially in conformity with the PKPA and UCCJA. Because neither the respondent-mother nor the respondent-maternal grandmother who has physical custody of the children were afforded any notice whatsoever-much less an opportunity to be heard, this Court holds and determines that the New Hampshire ex parte order dated October 2, 1986 is not entitled to full faith and credit under the PKPA or the UCCJA. (See *Sherry Ann F.* v. *Bennet S.*, 131 Misc.2d 854, 502 N.Y.S.2d 383 (Fam.Ct., Scho.Co., 1986))."

Another reason not to recognize the New Hampshire orders are that said orders are void because they are the result of sham proceedings in that the very least there is a willful failure of the Lebanon Family Division to follow the controlling law. The Lebanon Family Division in the State of New Hampshire refuses to recognize the father's right to basic due process under the constitutions of the United States of America and the State of New Hampshire. See *Moore* v. *Dempsey*, 261 U.S. 86, 91 (1923) ("whole proceeding is a mask"). Also note that Mitrano had no right of appeal from the New Hampshire state court judgment. See *Lynk* v. *LaPorte Superior Court No. 2*, 789 F.2d 554, 565 (7th Cir. 1986) wherein the court stated:

> ". . . [I]t seems inconceivable for example that due process would be interpreted today to allow a state to execute a criminal defendant without giving him any right to appeal from his conviction and sentence. Perhaps it is only a little less inconceivable that a state would be allowed to deny a person a divorce to which he was entitled as a matter of substantive right, on the basis of an unappealable decision of a judge of its divorce court . . . ."

The bottom line is that the petitioner has clearly stated exceptions to the *Rooker-Feldman* doctrine which should have prevented dismissal on the basis of lack of subject-matter jurisdiction by the lower courts. This Supreme Court should review the actions of the lower courts.

Personal Jurisdiction

While petitioner takes the position that the lower courts erred in dismissing the action on the basis of the Fourteenth Amendment. Petitioner respectfully asks this Supreme Court to analyze the personal jurisdiction issue under the Due Process Clause of the Fifth Amendment. In *United States* v. *Swiss American Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir. 2001), the court stated:

> "The personal jurisdiction inquiry in federal question cases like this one differs from the inquiry in diversity cases. See 28 U.S.C. § 1332. Here, 'the constitutional limits of the court's personal jurisdiction are fixed . . . not by the Fourteenth Amendment but by the Due Process Clause of the Fifth Amendment.' *United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir.1992) (*Pleasant St. I*). This distinction matters because under the Fifth Amendment, a plaintiff need only show that the defendant has adequate contacts with the United States as a whole, rather than with a particular state. *See id.* At the same time, however, the plaintiff must still ground its service of process in a federal statute or civil rule. *See id.* . . . ."

Also see *ESAB Group, Inc.* v. *Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997). Note that none of the respondents objected to the method of service of

process; hence, any objections to the service of process that any of the respondents could have made has been waived. Also see *O'Brien* v. *R.J. O'Brien & Associates, Inc.*, 998 F.2d 1394, 1399 (7th Cir. 1993) ("once the defendant has waived objections based on insufficiency of process and submitted generally to the jurisdiction of the court, the court is powerless to dismiss the suit for lack of personal jurisdiction"); *New York State Nat. Organization for Women* v. *Terry*, 961 F.2d 390, 398 n.7 (2nd Cir. 1992) ("The district court found that she had waived any objection to service, invoking Fed.R.Civ.P. 12(b)(5)"); *Albert Levine Associates, Inc.* v. *Hudson*, 43 F.R.D. 392, 393 (N.Y. 1967) ("But obtaining personal jurisdiction and making service of process, although closely related, are not synonymous. Federal Rule 12(b) treats them as separate defenses."). Also note that Rule 82 of Fed.R.Civ.P. dictates that the Rules do not limit or extend jurisdiction. Accordingly, *arguendo*, because this action comes before this Court as a civil rights action, the respondents are subject to the personal jurisdiction of the trial court under the Fifth Amendment.

Petitioner states the lower courts should not have dismissed this action also on the basis of lack of personal service over the respondents. Petitioner further notes the lower courts should not even have addressed the issue of personal jurisdiction because the lower courts had ruled that the lower courts did not have subject-matter jurisdiction. Once the lower courts ruled that they did not have subject-matter jurisdiction, the lower courts should have stopped.

Sanctions

The Fourth Circuit's decision did not state that it determined that Mitrano's appeal was frivolous pursuant to Rule 38 of the Federal Rules of Appellate Procedure. Moreover, the lower courts have failed to even address petitioner's discussion related to 28 U.S.C. § 1738A. Because the Fourth Circuit did not determine that this appeal was frivolous and instead appears to have based the award of sanctions upon prior litigation that occurred outside the jurisdiction of the Fourth Circuit, that is, in the state courts and in the federal courts in New Hampshire and Massachusetts, Mitrano contends that the award of sanctions is not allowable under Rule 38 of the Federal Rules of Appellate Procedure. Moreover, said award of sanctions is a violation of Mitrano's rights to due process because Mitrano was not given proper notice that sanctions could be awarded for litigation not before the Fourth Circuit.

As petitioner stated before the Fourth Circuit "it would be improper to bootstrap Mitrano by and through the various documents that the appellees [respondents] have attempted to place before" the lower courts. The law is clear that the Fourth Circuit is not allowed to take judicial notice of the facts relied upon by respondents in the other litigation.

Note that the court stated in *General Elec. Capital* v. *Lease Resolution*, 128 F.3d 1074, 1083 (7th Cir. 1997) that:

> ". . . If a court takes judicial notice of a fact whose application is

> in dispute, the court removes these weapons from the parties and raises doubt as to whether the parties received a fair hearing.
>
> ". . . A district court may not take judicial notice of fact where its application may be reasonably disputed because use of this evidentiary device in this manner 'would abrogate the fundamental requirement of due process.'" (Citation omitted.)

Also see *United States* v. *Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994); *Wyatt* v. *Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003), cert. denied *Alameida* v. *Wyatt*, 124 S.Ct 50 (2003); and, the Advisory Committee Notes to Rule 201 of the Federal Rules of Evidence. Thus, it would be a clear violation of petitioner's basic constitutional rights to due process to improperly bootstrapped petitioner with the words from other litigation.

In *Riverwood Intern. Corp.* v. *R.A. Jones & Co., Inc.*, 324 F.3d 1346, 1359 (Fed. Cir. 2003), the court stated:

> ". . . The court thus considers the charges of frivolousness as vilification of appellant's appeal, not the proper identification of frivolous conduct. Such appellate affectation is looked upon with disfavor and comes dangerously close to being itself frivolous. The court expects better from the members of our bar and disapproves of the cavalier assertion of allegations of frivolousness . . . ."

Moreover, in this instant case it is the respondents that have misstated the record by inserting facts that are not contained in the record of the lower courts (the trial court and Fourth Circuit). Also see *Capi Optics Profit Sharing* v. *Digital Equipment*, 950 F.2d 5, 12-13 (1st Cir. 1991) wherein the court stated:

> "From the opening contradictions of its complaint to the mound of misrepresentations in its reply brief we have never seen such a case of the meretricious posing as the meritorious. It is platitudinous to say that this wastes the time of the court and counsel, *SMS Data Products Gen. v. United States*, 900 F.2d 1553 (Fed.Cir.1990), going to the point of violating ethical guidelines, *Optyl Eyewear Fashion Intern. v. Style Companies*, 760 F.2d 1045 (9th Cir.1985) . . ."

Furthermore, although petitioner steadfastly maintains that the appeal before the Fourth Circuit is not frivolous, petitioner notes the statement contained in *Stevenson* v. *E.I. Dupont de Nemours and Co.*, 327 F.3d 400, 410 (5th Cir. 2003):

> ". . . Finally, this Court only rarely finds an appeal to be frivolous. *See, e.g., Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154, 1161 (5th Cir.1985). For example, in *Stelly v. Commissioner*, 761 F.2d 1113 (5th Cir.1985), the Court held an appeal frivolous only because a great weight

> of the authority in the case was clearly on point and did not favor the Plaintiff. *Id.* at 1116. This is not one of those cases . . ."

Also see *McKnight* v. *General Motors Corporation*, 511 U.S. 659, 660 (1994) vacating sanctions imposed by the Court of Appeals ("if the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument was foreclosed by Circuit precedent, the order was not proper").

Moreover, Mitrano has a fundamental right of access to the courts. See the Sixth and Fourteenth Amendments of the United States Constitution; *Inmates of Suffolk County Jail* v. *Rouse*, 129 F.3d 649, 660 (1st Cir. 1997) ("there is a constitutional right to court access"); *McDonald* v. *Hall*, 610 F.2d 16, 18 (1st Cir. 1979) ("fundamental right of access to the courts"); and, *Hawes* v. *Club Ecuestre El Comandante*, 535 F.2d 140, 144 (1st Cir. 1976) ("due process prohibits a state from denying access to its court"). Accordingly, Mitrano contends that any entry of an order by the Fourth Circuit denying and/or limiting his right to file any actions would be a clear violation of his rights granted under the United States Constitution.

While petitioner steadfastly maintains that this action and the appeal thereof are not frivolous, *arguendo*, the procedure for addressing a frivolous appeal is not as respondents have proceeded. Also see *Brooks* v. *Allison Div. of General Motors Corp.*, 874 F.2d 489, 490-491 (7th Cir. 1989) wherein the court explained that it was

not proper to first address the appeal on the merits and then file a motion for sanctions:

> ". . . Rather than filing a motion to dismiss the appeal on the ground that it was frivolous and hence did not even invoke this court's jurisdiction, see *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276-78 (7th Cir.1988) . . . and coupling the motion with a brief motion for sanctions, General Motors filed a full-fledged printed brief on the merits. This was a waste of General Motors' money and our time. A sanction for a frivolous filing is in the nature of a tort remedy for negligent (in aggravated cases, intentional) misconduct, *Hays v. Sony Corp.*, 847 F.2d 412, 418 (7th Cir.1988); and when a tort victim fails to take reasonable steps to mitigate his damages, those damages are either cut down or eliminated altogether under the principle of 'avoidable consequences,' on which see *EVRA Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 958 (7th Cir.1982). The duty to mitigate is already recognized in cases under Fed.R.Civ.P. 11, see . . . and the same principles govern sanctions proceedings under Fed.R.App.P. 38 as govern those under Rule 11. See, e.g., . . . We have imposed sanctions under Rule 38 for the filing of a frivolous request

> for sanctions, *Foy v. First National Bank*, 868 F.2d 251, 258 (7th Cir.1989), and today we take the next step and deny an otherwise meritorious motion for sanctions because the movant failed to take reasonable steps to mitigate the burdens imposed on it by the frivolous pleading for which sanctions are sought." (Some citations omitted.)

Another consequence of the Fourth Circuit's sanction is that the trial court assessed sanctions against petitioner on July 25, 2005 while the case was before the Fourth Circuit and then the Fourth Circuit based its opinion on October 20, 2005 in part on the sanctions awarded by the trial court. Because petitioner did not receive notice of the trial court's sanction until after the Fourth Circuit's decision due to a change in petitioner's address by someone other than the petitioner, the petitioner is caught in the "classic catch 22" situation because now the Fourth Circuit will not allow petitioner to appeal the trial court's award of sanctions by and through the sanctions imposed by the Fourth Circuit.

Finally, Mitrano notes that the filing of an action in the Fourth Circuit and also the filing of a similar action in the United States Court of Appeals for the First Circuit and the underlying action in the United States District Court for the District of New Hampshire is not in the Fourth Circuit's words "a clear pattern of harassing lawsuits". Note that in *Exxon Mobil Corp.* v. *Saudi*

Basic Industries, 544 U.S. 280, 125 S.Ct. 1517, 1527 n. 9 (2005), this Supreme Court stated that:

> "The Court of Appeals criticized Exxon Mobil for pursing its federal suit as an 'insurance policy' against an adverse result in state court. 364 F.3d 102, 105-106 (C.A. 3 2004). There is nothing necessarily inappropriate, however, about filing a protective action."

Note that the United States Court of Appeals for the First Circuit (where petitioner also filed as a protective measure) did not determine said similar appeal filed therein (Nos. 04-1748 and 04-2230) was subject to sanctions.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Peter Paul Mitrano
Pro se[1]
4912 Oakcrest Drive
Fairfax, Virginia 22030

Petitioner

Dated: February 21, 2006.

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1. The petitioner, Peter Paul Mitrano, is a member of the Bar of this Court and other courts.

APPENDIX

[150 Fed.App. 277]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1524

PETER PAUL MITRANO,

Plaintiff – Appellant,

versus

ELAINE R. WARSHELL; DEBORA A. BLAKE; MARTHA M. DAVIS; VIRGINIA L. KELLY; WILLIAM D. PHILIPS; L. JONATHAN ROSS; WIGGIN & NOURIE, PA; LARRY B. PLETCHER; JOHN PETER CYR; WILLARD G. MARTIN, JR.,

Defendants – Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CA-03-1298-A)

Submitted: August 17, 2005

Decided: October 20, 2005

Before WILKINS, Chief Judge, LUTTIG, Circuit Judge, and James C. DEVER, III, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

Peter Paul Mitrano, Merrifield, Virginia, Appellant Pro se. Robert E. Draim, HUDGINS LAW FIRM, Alexandria, Virginia, for Appellee Martha M. Davis; Renu M. Setaro, WRIGHT, ROBINSON, OSTHIMER & TATUM, Richmond, Virginia, for Appellee Elaine R. Warshell; Carol T. Stone, Jordan, Coyne & Savits, L.L.P., Fairfax, Virginia, for Appellees L. Jonathan Ross; Wiggin & Nourie, PA; Christopher W. Schinstock, GANNON & COTTRELL, P.C., Alexandria, Virginia, for Appellees Debora A. Blake, Virginia L. Kelly, and William David Phillips; Daniel J. Mullen, NEW HAMPSHIRE ATTORNEY GENERAL'S OFFICE, Concord, New Hampshire, for Appellees Larry B . Pletcher, John Peter Cyr, and Willard G. Martin, Jr.; Sydney E. Rab, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellees Larry Pletcher, John Peter Cyr, and Willard G. Martin, Jr.

PER CURIAM:

Peter Paul Mitrano, an attorney proceeding pro se, appeals a district court order dismissing his various claims against his wife, Virginia L. Kelly, and others (collectively, "Appellees") arising from a previously litigated domestic relations dispute. We affirm.

I.

In 1992, Mitrano and Kelly obtained a divorce in the Commonwealth of Virginia. At that time, Mitrano was granted primary custody of the couple's three minor children (Christina, Peter Jr., and Christopher). Despite their divorce, the following year Mitrano and Kelly moved to New Hampshire where they shared a household and custody of their children until October 2000. On October 16, 2000, Kelly filed an emergency petition in a New Hampshire state court seeking custody of Christina. The court awarded temporary custody to Kelly on an ex parte basis. Later, at a hearing attended by both parties, the court awarded sole custody to Kelly after determining that Mitrano had inappropriately physically disciplined their daughter.

In late December 2000, without notifying Kelly, Mitrano moved to Virginia with Peter Jr. and Christopher. Kelly petitioned for and was granted temporary custody of the boys by the New Hampshire state court. Kelly later sought

enforcement of the New Hampshire order in Virginia. In response to Kelly's action, Mitrano asked three different Virginia judges to enforce the 1992 Virginia custody order. All three determined that New Hampshire had jurisdiction and directed Mitrano to obey the New Hampshire order. The New Hampshire court subsequently found Mitrano in contempt for moving his sons to Virginia without seeking permission from the court. At the same time, Kelly traveled to Virginia to see her sons and then moved with them to Vermont.

Mitrano filed suit in a Vermont state court seeking enforcement, once again, of the 1992 Virginia custody order. Mitrano continued to dispute the jurisdiction of the New Hampshire court to make custody determinations and the validity of its child custody orders. Mitrano argued to the Vermont state court that the New Hampshire orders were invalid because New Hampshire was not the children's "home State" within the meaning of the Parental Kidnapping Prevention Act (PKPA). 28 U.S.C.A. § 1738A(b)(4) (West Supp. 2005). Specifically, Mitrano claimed that New Hampshire could not be the children's "home State" because neither he, Kelly, nor their children were residents of New Hampshire after December 2000. See id. The Vermont court dismissed Mitrano's petition after determining that New Hampshire was the children's "home State" under the PKPA. Mitrano appealed this decision unsuccessfully to the Supreme Court of Vermont. See Mitrano v. Kelly, 785 A.2d 191 (Vt. 2001) (unpublished table decision), cert. denied, 534 U.S. 1115 (2002).

Undeterred by adverse rulings from the courts of three states, Mitrano then sought declaratory and injunctive relief from the United States District Court for the District of New Hampshire, naming as the defendant the judge presiding over the New Hampshire custody dispute. The district court denied relief, noting that Mitrano, as an attorney, should have known that his claims were meritless. See Mitrano v. Martin, No. 01-153-M, 2002 WL 122384, at *1 (D.N.H. Jan. 22,2002) Nos. 02-1231, 02-1348 (1st Cir. Aug. 29, 2002) (minute order) .

Mitrano then filed this action in the Eastern District of Virginia, naming as defendants Kelly, Kelly's brother-in-law, attorneys and judges associated with the New Hampshire and Vermont litigation, and his own former attorney and law firm.[1] The district court granted Appellees' motion to dismiss, concluding that it lacked personal jurisdiction over each Appellee, see Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 396-98 (4th Cir. 2003), and that it was without subject matter jurisdiction under the domestic relations exception to federal jurisdiction, see Ankenbrandt ex rel L.R. v.

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[1]Mitrano filed an identical action in the District of New Hampshire. The district court dismissed that case on jurisdictional grounds, and the Court of Appeals for the First Circuit affirmed. See Mitrano v. Warshell, Nos. 03-469-JD (D.N.H. May 7, 2004), aff'd, No. 04-1784, 04-2230 (1st Cir. Sept. 15, 2005) (minute order).

Richards, 504 U.S. 689, 703 (1992), and under the Rooker-Feldman doctrine, see D.C. Ct. App. V. Feldman, 460 U.S. 462, 476, 482 & n.16 (1983); Rooker v. Fid. Trust Co., 263 U.S. 413, 415-16 (1923).

II.

Mitrano contends that the district court erred in determining that it lacked both subject matter and personal jurisdiction. We review a dismissal for lack of subject matter or personal jurisdiction de novo. See Nat'l Taxpayers Union v. Soc. Sec. Admin., 376 F.3d 239, 241 (4th Cir. 2004), cert. denied, 125 S.Ct. 1300 (2005); Carefirst of Md., 334 F.3d at 396.

Having reviewed the briefs and applicable law, we conclude that the district court correctly decided the issues before it. We accordingly affirm the dismissal of claims. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

III.

Following appeal to this court, Appellees, excluding the three New Hampshire state court judges, moved for sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure. Under Rule 38, we are authorized to impose "just damages and single or double costs" for frivolous appeals. Fed. R. App. P. 38; see Bast v. Cohen, Dunn & Sinclair, PC, 59 F.3d 492, 496 (4th Cir.

1995). We are permitted to award damages and costs "as a matter of justice to the appellee and as a penalty against the appellant." Fed. R. App. P. 38 advisory committee notes.

Mitrano has proven himself to be extremely litigious. He has persisted in filing multiple actions despite the unanimous rejection of his claims by every court that has considered them. With regard to his activity in the federal courts, Mitrano has filed a declaratory judgment action in the District of New Hampshire, this action, and an action nearly identical to this one in the District of New Hampshire. In appealing the dismissal of each of these actions, he has ignored repeated warnings from the district courts regarding the frivolity of his claims.[2]

Moreover, when this appeal is considered together with all connected litigation and evidence of prior conduct in unrelated lawsuits, a clear pattern of harassing lawsuits and abusive behavior emerges. See In re Ballato, 252 B.R. 553, 558-59 (Bankr. M.D. 2000) (finding that Mitrano filed involuntary bankruptcy petition in bad faith); Melka Marine, Inc. v. Town of Colonial Beach, 37 Va. Cir. 108, 111-13 (1995) (imposing sanctions on Mitrano for his "voracious" conduct of litigation). Finally, in connection with the child custody proceedings underlying this appeal

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[2]Indeed, Mitrano appears to recognize the impossibility of success, characterizing this appeal as "the legal equivalent of General Custer's last stand." Br. for Appellant at 37.

Mitrano has been held in contempt of court by the New Hampshire state court and has been assessed attorney's fees more than once, most recently by the district court in this case. Mitrano v. Warshell, No. 1:03cv1298 (E.D. Va. July 25, 2005) (order granting motions for sanctions).

In light of the above, we grant the motion for sanctions. Appellees are hereby directed to submit an itemized statement of attorneys' fees and costs to the Court and Mitrano within ten days of this opinion issuing. Mitrano has 21 days from receipt of Appellees' statement to file objections. In addition, we enjoin Mitrano from filing any further civil appeals in this court until monetary sanctions are paid, and unless a district court certifies that the appeal is not frivolous. See In re Vincent, 105 F. 3d 943, 946 (4th Cir. 1997) (per curiam).

IV.

For the reasons set forth above, we conclude that the district court correctly dismissed complaint. Accordingly, we affirm.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

PAUL MITRANO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 03-1298-A
ELAINE R. WARSHELL,	)	
et al.,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

THIS MATTER is before the Court on Defendants Warshell, Blake, Davis, Pletcher, Cyr, Martin, Kelly, Phillips, Ross, and Wiggin & Nourie, P.A.'Motions to Dismiss. Plaintiff brings this claim as a result of a modification of a child custody order by a New Hampshire state court and seeks damages from the parties involved in the proceedings. There are two issues before the Court. First, whether this Court may extend personal jurisdiction in a 42 U.S.C. 1983 claim over non-resident defendants, who are judges, attorneys, and the Plaintiff's ex-wife, and were involved in a child custody dispute and have had no contact with Virginia. Second, whether this Court has diversity jurisdiction over this case pursuant to 28 U.S.C. 1332 where Plaintiff seeks

to overturn a New Hampshire child custody order and has sued judges and attorneys for claims stemming from this child custody order.

For the first issue, the Court holds that the Court does not have personal jurisdiction over the Defendants, because Plaintiff failed to demonstrate how the Defendants have committed acts or omissions in Virginia, how the Defendants have conducted business in Virginia, how the Defendants have purposefully availed themselves of Virginia law, or how the exercise of personal jurisdiction would be constitutionally reasonable. For the second issue, the Court holds that it shall not extend federal diversity jurisdiction to this matter, because the Supreme Court has held that federal courts do not have jurisdiction over matters concerning child custody disputes.

I. BACKGROUND

This case arises as a result of a child custody dispute. On September 4, 1992, following the divorce of Plaintiff and Virginia Kelly, one of the named Defendants, the Circuit Court of County, Virginia, entered an order granting the parties joint custody of their three minor children. Following this order, both Plaintiff and Kelly moved to New Hampshire where they continued to live in the same household with their children. On October 16, 2000, Kelly filed an Emergency Petition seeking sole custody of the children in a New Hampshire Court. Based on the facts in this Petition, the New Hampshire Court, on an *ex parte* basis, awarded temporary custody of the daughter to Kelly.

On December 28, 2000, following a hearing in which both parents were present, the court granted Kelly sole custody of the daughter. The court found that Plaintiff had disciplined his daughter in an unreasonable manner, and the daughter preferred to live with her mother. At the end of December 2000, Plaintiff moved to Virginia with his two sons (also children of Kelly) without notifying the mother. Kelly sought an *ex parte* order from the New Hampshire court for temporary custody of the boys, which the court granted on January 3, 2001. Kelly sought enforcement of this order from the Fairfax County Juvenile and Domestic Relations Court.

On January 4, 2001, the Fairfax County Juvenile and Domestic Relations court ordered that neither party should remove the children from Virginia. However on January 5, 2001, as a result of a separate petition filed by Plaintiff, Judge Hudson of the Fairfax Circuit Court entered an order declining to exercise jurisdiction in the parties' child custody dispute, and specifically ordered Plaintiff to obey the New Hampshire order. On January 8, 2001, Plaintiff appeared *ex parte* before Judge Valentine of the Fairfax Juvenile and Domestic Relations Court and presented the same petition that had been rejected by Judge Hudson. Judge Valentine denied petition. Also on January 8, 2001, Plaintiff appeared *ex parte* before Judge Roush of the Circuit Court, and presented a very similar petition to the one that had been rejected by Judge Hudson and Judge Valentine. Judge Roush conferred with Judges Hudson and told Plaintiff that New Hampshire had jurisdiction.

Plaintiff attempted to appeal to the Virginia Court of Appeals, but his case was dismissed because of failure to post the requisite bond. the requisite bond. On January 11, 2001, the New Hampshire court entered an order finding Plaintiff in contempt of court because he had moved his sons from New Hampshire to Virginia without the knowledge and consent of his ex-wife. Around this time, plaintiff filed an action in Vermont, seeking to enforce the original custody order dated September 4, 1992. On January 23, 2001, the Vermont court dismissed Plaintiff's petition and held that he was not entitled to enforce the original Fairfax Virginia Circuit Court child custody order dated September 4, 1992. The Vermont court found that New Hampshire was the "home state" within the meaning of 28 U.S.C. § 1738 and that Plaintiff was not entitled to enforcement of the original Fairfax, Virginia Circuit Court order (entered in 1992), because it has been superceded by the New Hampshire order (entered in 2001).

Plaintiff appealed to the Vermont Supreme Court which affirmed the decision of the lower court. Plaintiff then filed a petition for certiorari to the U.S. Supreme Court. His petition was denied on January 22, 2002. Most recently, Plaintiff filed identical complaints in this Court and in a district court in New Hampshire.

Plaintiff brings the current action pursuant to 42 U.S.C. 1983, claiming that he has been deprived of his Fourth, Fifth, and Ninth Amendment rights. The basis of his claim is that the Defendants unlawfully and improperly interfered with his fundamental right to raise his

children free of interference. The named Defendants include Warshell and Davis, attorneys who represented Kelly in New Hampshire child custody proceedings, Blake, the *guardian ad litem* in the child custody proceedings, Pletcher, Cyr, and martin, judges who presided over the proceedings, Kelly, Plaintiff's ex-wife, and Ross and Wiggin & Nourie, P.A. are the attorney and law firm that represented Plaintiff in the child custody dispute. It is unclear from the pleadings who is or what his relationship is to the child custody dispute.

In each of their Motions to Dismiss, Defendants argue that this Court lacks federal diversity jurisdiction, because although Plaintiff and Defendant are from different states and the amount in controversy is over $75,000, there is a domestic relations exception to federal diversity jurisdiction which applies to this case. Defendants also argue that Plaintiff has failed to establish personal jurisdiction over Defendants. Defendants explain that Plaintiff alleges Defendants' acts placed them under the authority of Va. Code Ann 8.01-328.1, because the Defendants caused "tortuous injury by an act or omission in the Commonwealth of Virginia." However, Plaintiff fails to specify any tortious injury caused by the Defendants or any such actions or omissions which occurred in Virginia. In addition, the plaintiff has failed to establish that Defendants have had contacts with Virginia.

Each Defendant raised a of individualized arguments that will not be addressed here, since the Court must first address whether jurisdiction is proper.

Plaintiff argues that he has satisfied the requirements of diversity jurisdiction and that the domestic relations exception does not apply, because he is not seeking a determination of child custody in this lawsuit. Plaintiff seeks monetary damages. Plaintiff also argues that this Court has personal jurisdiction because he is a resident of Virginia, and the tortious acts were committed against him while he was a resident of Virginia. Plaintiff continues by asserting that the Defendants may not now challenge personal jurisdiction since they never objected to service of process, and have therefore waived this defense.

II. DISCUSSION

A. Standard of Review

When a party disputes the extension of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), the plaintiff has the burden of proving that jurisdiction is proper by a preponderance of the evidence. *Mylan Laboratories, Inc. v. N.V.*, 2 F.3d 56, 60 (4th Cir. 1993). When the merits of this motion are determined without an evidentiary hearing, the plaintiff is only required to prove that personal jurisdiction over the defendants is proper by a prima facie standard. *Id.* This court is required to view all evidence in the light most favorable to the plaintiff. *Id.*

As with personal jurisdiction, the Plaintiff bears the burden of proving the necessary elements of federal diversity jurisdiction. *Krier-Hawthorne v. Beam*, 728 F.2d 658, 667-68 (4th Cir. 1984).

B. Analysis

This Court does not have jurisdiction over this claim for two reasons. First, Plaintiff has failed to show that the Defendants have purposefully availed themselves by conducting activities within Virginia, that complaint arises out of activities directed at Virginia, or how the exercise of personal jurisdiction would be constitutionally reasonable. Second, the Court does not have diversity jurisdiction over this claim, because the underlying issues involve a child custody dispute. The Supreme Court has held that child custody disputes may not be resolved in federal court.

1. Personal Jurisdiction

As a preliminary matter, the Court must address whether Defendants have waived their right to challenge personal jurisdiction. Plaintiff argues that because Defendants have not to service of process in their Motions to Dismiss, they waived their right to object to personal jurisdiction. Plaintiff correctly states that Defendants have not challenged service of process, but all of the Defendants have addressed the issue of personal jurisdiction in their first Motions to Dismiss. The two defenses are not interdependent upon one another. Because Defendants have made timely challenges to the Court's personal jurisdiction, they have not waived this defense. Fed. Civ. P. 12 (h) (1) (B).

The Court holds that it shall not extend personal jurisdiction over the Defendants,

because doing so would infringe on Defendants' due process rights and the Plaintiff has not satisfied the elements of specific jurisdiction.

State law governs how a federal court may extend personal jurisdiction. *Young v. New Haven Advocate*, 315 F.3d 256, 261 (4th Cir. 2002). In this case, the Court must apply Va. Code Ann. 8.01-328.1, the Virginia long arm statute. The Fourth Circuit requires the Court to employ a two prong test in order to determine whether personal jurisdiction is proper in this case. *English & Smith v. Metzger*, 901 F.2d 36, 38 (4th Cir. 1990). First, the Court must determine whether the Virginia long arm statute applies to the named Defendants. *Id.* Second, the Court must determine whether this exercise of jurisdiction would infringe on the Defendants' due process rights. *Id.* at 39.

a. Virginia's Long Arm Statute

The Plaintiff moves this Court to extend personal jurisdiction over the Defendants pursuant to Va. Code § 8.01-328.1(3) which allows the Court to exercise of personal jurisdiction over a person "[c]ausing tortious injury by an act or omission in this Commonwealth." The Fourth Circuit has found that Virginia's long arm statute permits personal jurisdiction to the extent that would be allowed by due process, which reduces the Court's inquiry to merely the second prong of the test. *Young*, 315 F.3d at 261.

b. Due Process Analysis

In accordance with due process standards, this Court must determine whether the Defendants have had "minimum contacts" with Virginia "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

A Court may extend personal jurisdiction based on either specific or general jurisdiction. Young, 315 F.3d at 261. When the contact with Virginia is the basis of the claim, the standards of specific jurisdiction will dictate whether personal jurisdiction is proper. *Id.* In order to find specific jurisdiction, the Court must consider "(1) the extent to which the defendant 'purposefully avail[ed]' itself of the privilege of conducting activities in the State; (2) whether the plaintiff claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally 'reasonable.'" *ALS Scan, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002).

When the Defendants' contact with Virginia is not the basis of the suit, the Plaintiff must assert general jurisdiction requirements. In order to demonstrate general jurisdiction, Plaintiff must establish that the Defendants' activities in Virginia have been "continuous and systematic." *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F. 3d 390 (4th Cir. 2003). Plaintiff has not suggested that any of the Defendants have conducted "systematic and continuous" activities in Virginia. Therefore, general jurisdiction cannot apply to this case.

In his Complaint, the Plaintiff states that the "defendants are subject to the personal jurisdiction of this Court . . . because the cause of action arose in part in this judicial district." Complaint at ¶ 3. Also, Plaintiff alleges that "the actions and inactions of defendants . . . caused plaintiff Mitrano [sic] a harmful effect within the Commonwealth of Virginia." Pl.'s Opposition to the Motions to Dismiss at 7. From these statements, the Court finds that Plaintiff intended this lawsuit arise from Defendants' alleged contact with Virginia. As a result, Plaintiff must fulfill the elements of specific jurisdiction in order for this court to properly extend personal jurisdiction over Defendants.

i. Specific Jurisdiction

The Court may not extend personal jurisdiction over the Defendants pursuant to specific jurisdiction, because the Defendants do not reside in Virginia, have no business in Virginia, and have not availed themselves of Virginia law.

(1) Purposeful Availment

First, Plaintiff has failed to assert how any of the Defendants have purposefully availed themselves to conducting activities in Virginia. Purposeful availment requires that a non-resident of Virginia have some activities or contact with Virginia. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The Defendants' activities or contact must be purposeful to the extent that the non-

resident defendant "invoke the benefits and protections" of Virginia's laws. *Id.* In his Opposition to Defendant's Motion to Dismiss, Plaintiff states that these Defendants caused a harmful effect within the Commonwealth of Virginia, but never explains what acts or omissions were committed by Defendants. Pl.'s Opposition to the Motions to Dismiss at 7. Plaintiff concedes that Defendants are citizens of New Hampshire, Vermont, and Maryland. However, Plaintiff does not explain what conduct or how their conduct directly or indirectly affected him in the Commonwealth of Virginia.

During oral argument, Plaintiff asserted that Defendants Ross, Kelly and Warshell had demonstrated minimum contacts with Virginia by sending him correspondence and faxes while he was a resident of Virginia. Plaintiff also pointed out that Ross was a member of the Virginia State Bar. However, sending letters and faxes to persons within a particular state is not enough to establish minimum contacts with that state. Furthermore, Defendant Ross explained that although he is a member of the Virginia State Bar, he is not active and has never practiced law in Virginia. Looking at this evidence in the light most favorable to the Plaintiff, the Court can only conclude that these Defendants have not conducted any activities in Virginia which would support a finding that the Defendants purposefully availed themselves of Virginia. Even most specific allegations regarding Kelly, Warshell, and contacts with Virginia is not enough to show that Ross purposefully availed himself of Virginia's laws.

Even assuming, *arguendo,* that the Defendants have purposely availed themselves of Virginia law, Plaintiff has also failed to show that his claim that his claim arises from Defendants' activities directed at Virginia or that it would be constitutionally reasonable for this Court to extend personal jurisdiction.

(2) Whether Plaintiff's Claim Arises from Defendant Activities Directed at Virginia

Second, Plaintiff has failed to show that any of the Defendants' activities, all of which occurred in New Hampshire and Vermont, were directed at Virginia. Plaintiff claims that Defendants inflicted harm upon him while he resided in Virginia. However, Plaintiff was actually a resident of New Hampshire when custody of his daughter was modified, and a New Hampshire court granted sole custody of his children to his ex-wife. Plaintiff's attorney and law firm, Ross and Wiggin & Nourie, P.A., terminated their representation of him only after he moved to Virginia contrary to their advice. Perhaps, most importantly, this Court does not recognize the tort Plaintiff claims Defendants committed. No court has acknowledged the tort of interfering with the basic right to raise children. Therefore, Plaintiff has failed to show that Defendants conducted any activities directed at Virginia which gave rise to this claim.

(3) Constitutionally Reasonable

Third, Plaintiff fails to demonstrate how exercising personal jurisdiction would be constitutionally reasonable. The Court may extend jurisdiction over a nonresident defendant as long as the defendant has sufficient minimum contacts with Virginia that requiring a defendant to execute a defense in Virginia would not "offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. Plaintiff has not shown how Defendants have had any contacts with Virginia, let alone minimum contacts. A majority of the conduct contained within his complaint occurred when neither the Plaintiff nor any of the Defendants were residents of Virginia. Therefore, requiring the Defendants to participate in a lawsuit in this jurisdiction could not be characterized as constitutionally reasonable.

2. Diversity Jurisdiction

The Court holds that it shall not extend federal diversity jurisdiction to this matter, because the domestic relations exception applies. Federal district courts may assert original jurisdiction in matters between citizens of different states when the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. The facts of this claim clearly satisfy this requirement, since Plaintiff is a citizen of Virginia, Defendants are citizens of New Hampshire, Vermont, and Maryland, and Plaintiff seeks over $50 million in damages. However, the Supreme Court has recognized a domestic relations exception to federal diversity jurisdiction in cases involving

issues of divorce, alimony, and child custody cases. *Ankenbrandt v. Richards*, 504 U. S. 689, 703 (1992). When issues involving a domestic relationship have already been determined pursuant to state law, and these issues have no bearing on the underlying torts alleged, federal courts may extend jurisdiction as long as the requirements of 28 U.S.C. § 1332 have been met. *Id.* at 706.

The Plaintiff claims that the domestic relations exception does not apply, because this is not a child custody dispute. Pl.'s Opposition to the Motions to Dismiss at 3. However, Plaintiff asks the Court to award damages until his Children are returned to his custody. Complaint at ¶ 66, 69, 74, 84, 89. The essence of Plaintiff's request for damages is to seek monetary damages per day until his children are restored to his custody. These allegations in the Complaint directly dispute Plaintiff's assertion that the purpose of this case is not to resolve a child custody dispute. Because the child custody issue is central to deciding the merits of this case, the domestic relations exception does apply. This court declines to extend federal diversity jurisdiction over this case.

IV. CONCLUSION

In conclusion, this Court shall not extend personal jurisdiction over the Defendants. Plaintiff has failed to show (1) that the Defendants have committed any acts or omissions in Virginia; (2) that the Defendants have conducted any business in Virginia; (3) that the Defendants have

availed themselves of Virginia law; or (4) that the exercise of-personal jurisdiction would be constitutionally reasonable. Additionally, this Court shall not extend federal diversity jurisdiction over this matter. The Supreme Court has held that federal jurisdiction over matters concerning child custody disputes, and Plaintiff has failed to demonstrate why the domestic relations exception would not apply to this case when he seeks monetary damages until his children returned to his custody.

The Court grants all Defendants' Motions to Dismiss, in the alternative, on all grounds set forth in Defendants' Motions, because Defendants' motions and arguments persuasively argue that this Complaint fails to state a claim for relief under Fed. R. Civ. P. 12 (6) and that this complaint is frivolous.

For the foregoing reasons it is hereby

ORDERED that Defendants Warshell (Docket No. 15), Davis (Docket No. 18), Philips and Kelly (Docket No. 21), Wiggin & Nourie, P.A. and Ross (Docket No. 27), Martin, Cyr, and Pletcher (Docket No. 32), and Blake's (Docket No. 36) Motions to Dismiss are GRANTED.

This Clerk is directed to enter judgment pursuant to Fed. R. Civ. P. 58 in favor of the Defendants Elaine R. Warshell, Debora A. Blake, Martha M. Davis, the Honorable Larry B. Pletcher, the Honorable John Peter Cyr, the Honorable Willard G. Martin, Jr., Virginia Kelly, William D. Philips, L. Jonathan Ross, and Wiggin & Nourie, P.A. and against Plaintiff Peter Paul Mitrano.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 9th day of April, 2004.

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
4/9/04

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 21, 2005

No. 04-1524
CA-03-1298-A

PETER PAUL MITRANO,

Plaintiff – Appellant

versus

ELAINE R. WARSHELL; DEBORA A. BLAKE; MARTHA M. DAVIS; VIRGINIA L. KELLY; WILLIAM D. PHILIPS; L. JONATHAN ROSS; WIGGIN & NOURIE, PA; LARRY B. PLETCHER; JOHN PETER CYR; WILLARD G. MARTIN, JR.,

Defendants – Appellees

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On Petition for Rehearing and Rehearing En Banc

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The appellant's petition for rehearing and rehearing en ban was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Chief Judge Wilkins, Judge LUTTIG, Judge DEVER, District Judge sitting by designation.

For the Court,

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PETER PAUL MITRANO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 03-1298-A
ELAINE R. WARSHELL, *et al.*,	)	
	)	
	)	
Defendants.	)	

Judgment

THIS MATTER is before the Court on the November 8, 2004 Report and Recommendation of Magistrate Judge Thomas Rawles Jones, Jr. regarding Defendants' motions for sanctions under Federal Rule of Civil Procedure 11. FED. R. CIV. P. 11. In its previous Memorandum Order of July 25, 2005, the Court over-ruled Plaintiff's objections to the awarding of attorney's fees and sustained Plaintiff's objections to the imposition of a civil fine. From the foregoing, it hereby

ORDERED that JUDGMENT is ENTERED against Peter Paul Mitrano and in favor of Defendants Virginia Kelly, William D. Phillips, and Deborah Blake in the amount of four thousand eight hundred thirty-four dollars and five cents ($4,834.05); for Defendants L. Jonathan

Ross, and Wiggin & Nourie, P.A. in the amount of thirteen thousand nine-hundred sixty-eight dollars and sixty-one cents ($13,968.61); for Elaine Warshell in the amount of twenty-six thousand sixty-four dollars and fifty-eight cents ($26,064.58); and for Martha Davis in the amount of thirty-nine thousand nine hundred ninety-two dollars and fifty-six cents ($39,992.56) for a total of eighty-four thousand eight hundred fifty-nine dollars and eighty cents ($84,859.80).

The Clerk is DIRECTED to ENTER JUDGMENT pursuant to Federal Rule of Civil Procedure 58.

The Clerk is directed to forward a copy of this Order to Counsel.

Entered this 25 day of July, 2005.

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
07/25/05

FILED: January 18, 2006

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1524
(CA-03-1298-A)

PETER PAUL MITRANO,

Plaintiff – Appellant,

versus

ELAINE R. WARSHELL; DEBORA A. BLAKE; MARTHA M. DAVIS; VIRGINIA L. KELLY; WILLIAM D. PHILIPS; L. JONATHAN ROSS; WIGGIN & NOURIE, PA; LARRY B. PLETCHER; JOHN PETER CYR; WILLARD G. MARTIN, JR.,

Defendants – Appellees.

O R D E R

Appellees Warshell, Blake, Davis, Kelly, Philips, Ross, And Wiggin & Nourie have filed motions for attorney fees. Appellant has filed

objections to the motions.

The Court grants the motions for attorneys' fees and approves the full Amount requested of $41,521.95.

For the Court,

/s/ Patricia S. Connor

CLERK